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AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830.

By William E. Nelson. Cambridge and London: Harvard University Press. 1975. Pp. 269. \$17.50.

The dignity, prosperity, and influence of the legal profession is one of the most striking phenomena of American culture. Surely in no other country have lawyers occupied a comparable position or played a comparable role.¹

This comment by a leading contemporary historian would have surprised the revolutionary generation of 1776. Lawyers generally were regarded with distrust by Puritans who, with many others, sought to abolish the Bar and give citizens direct access to the courts in the new republic. Indeed, a hostility to lawyers as self-aggrandizing parasites who will argue anything for a price is deeply rooted in American lore.

Nelson's book is not in the first place about the rise of the legal profession in America. Rather it is a study of the Americanization of the common law through an examination of all the court records in one state, Massachusetts, from 1760 to 1830. However, Nelson belongs to the new group of legal historians who are not simply interested in the development of legal doctrine but would set those developments in their social and political context. The rise of the legal profession is very much involved in the process by which law was taken out of the hands of the people (juries) and put into the hands of a specially trained legal elite.

This is the first effort to study American law during this foundational period on the basis of court records themselves. It undoubtedly lays the groundwork for future treatment of the indigenous American body of law.

Pre-revolutionary Massachusetts had a legal system vastly different from the one we know today. Legislative activity was minor and executive power was limited, especially in the field of law enforcement, to what popular sentiment would permit. Real power lay in the courts, which also performed many administrative functions; within the court system, juries dominated. Judges could instruct juries on the law, but procedure required that each

judge instruct jurors separately (sometimes contradictorily), and that counsellors could argue the law as well. It was finally up to the juries to determine both law and facts. Thus the legal system manifested the social consensus on law and values which juries quietly and secretly articulated.

How did the pre-revolutionary communities use this power? Nelson argues that they used it to support primary religious and moral values, reflecting an ethical unity rooted in the religious establishment which promulgated moral standards for the community. Thus, in the fifteen years preceeding the War, the majority of criminal prosecutions were in the domain of moral and religious conduct, ranging from fornication to Sabbath profanation. Similar values were present in civil law. For example, civil defamation suits did not require proof of damages; lying itself was grounds for imposing liability. Similarly, the law of creditors and debtors was structured to discourage persons from going into debt in order to speculate or to acquire unnecessary luxuries.

The law supported social harmony and ethical goals in many ways. Laws guaranteeing minimum subsistence for all, minimizing redistribution of wealth, stressing prior possession in property and encouraging monopolistic control of scarce resources promoted social stability. Competition and economic striving were discouraged by contract law which was based on ideas of fair exchange and which involved formalities making executory contracts extremely difficult to arrange.

The War of Independence set in motion intellectual and social currents which transformed Massachusetts' legal and social order. The new theory of sovereignty stressing the will of the people resulted in the rise of political parties which represented conflicting interests, shattering the old unity through public agitation over social policies and undermining social stability.

What new values emerged from this protracted conflict? After a war fought for liberty, it is not surprising that "liberty" became a primary value. "Liberty" meant several things. It required institutions through which the governed could determine the substance of the law. The new powers granted to the legislature reflected this. Legal procedures safeguarding civil rights for criminals also developed on these grounds. Finally, "liberty" had egalitarian implications militating against slavery and for the rights of women and members of dissenting religious sects.

Nelson describes the way in which these libertarian changes accelerated the breakdown of the ideal that the community should

stand united in the pursuit of shared ethical ends. What could community members unite around? Violence and mob action, particularly in the aftermath of the War and during the rise of radical libertarian doctrines, led to an emphasis on order and stability as it pertained to the protection of property. Accordingly, the criminal law suddenly stopped prosecuting men for moral and religious offenses and concentrated on offenses against property, thereby transforming the offender from a "sinner" into an anti-social culprit, a criminal.

While initially property rights were thus expanded and strengthened, the expansion of liberty—always associated with private property—gave way before the rise of public and private interests which indeed rendered private property less safe than ever before, as property became a commodity available for economic development. Monopolistic privileges, once a source of community stability, were replaced by judgments which favored development. Defaults were no longer viewed as breaches of trust but as actions resulting from marketplace circumstances beyond the control of the debtor for whom some relief would have to be provided. Corporations, once designed as a means of serving community ends, became instruments for furthering its members' economic well-being. The law of contracts no longer furthered ethical interest in fair exchange but became an expression of rugged individualism, reflecting the idea that a man could do whatever he willed with his property so long as he did not injure another's. Competition and materialism became the new dominant values as the old ethical consensus broke down and the communities rallied under the banner of progress and economic development.

In all this, Nelson discerns a shift from otherworldly, religious values to worldly, materialistic ones. While individuals were free to choose their own values, the law was not neutral or value-free. It came to view man not as a spiritual being but as an economic one and actively favored the new competitive and materialistic values.

Some of the legal changes were statutory, but the big surprise is the extent to which much of the law was judge-made. The changes occurred so rapidly because of the explosion of the nascent industrial revolution that not only were the judges the first and most rapid reactors, but the very rapidity of change revealed to judges and lawyers alike that legal development was indeed taking place, that law was being "made" rather than, as had traditionally been thought, "found."

Such development required important and permanent structural changes in the American legal system. Law finding was taken out of the hands of juries and placed in the hands of judges; new rules of evidence enabled the courts to supervise the fact-finding process as well. And the government finally acquired a sufficient monopoly on power to enforce the laws.

Nelson concludes by stating,

The changes in the power of the jury to make law, in judges' understanding of their power to change law, and in the ability of legal institutions to enforce law suggest that a final, fundamental change had occurred in the nature and social function of law. Whether it was made by courts or legislatures, law in nineteenth-century America had ceased to be a mechanism for the preservation of local power and the building of local consensus or to be a mirror of stable and widely shared ethical values. In part it had become a mechanism for giving individuals liberty to choose their own ethical values and for enforcing the choices they made. More often, however, the function of the law was to resolve disputes among individuals seeking control over a particular economic resource. In resolving those distributional disputes, the law came to be a tool by which those interest groups that had emerged victorious in the competition for control of law-making institutions could seize most of society's wealth for themselves and enforce their seizure upon the loser's.²

Nelson has titled this book, *THE AMERICANIZATION OF THE COMMON LAW*, even though it deals only with Massachusetts, on the hypothesis that what happened in that state happened elsewhere along the same lines. There is some research already supporting this thesis, but the major test will occur when historians can study the comparable development in a state such as Pennsylvania, where conflict politics had already replaced consensus politics before the Revolution, and where there was no religious establishment comparable to that found in Massachusetts.

Nelson's heavily documented line of development makes good sense. However, a cautionary word seems necessary at certain points. The decline of prosecutions for moral offenses can only partly be explained by the breakdown in unity and loss of spiritual goals. The churches had a rigorous internal system for hear-

ing confessions of, say, fornicators, and restoring them without recourse to law. The growing Baptist movement refused to take matters to court which they could decide within their own community. More important is the absence of ecclesiastical courts in the American colonies. This left the whole matter of reporting and enforcing moral or ecclesiastical offenses in the hands of government which was rarely interested in pursuing the matter. Thus, the state's interest in pursuing moral prosecutions was dependent on a variety of factors.³ Indeed, just after the period covered by Nelson, when presumably moral fervor had been largely replaced by economic interests, the trial and conviction of Abner Kneeland for blasphemy took place in Massachusetts.

Actually, moral concern remained foremost even during the period of exploding commercial and economic activity because of the universally held theory in America and England that moral virtue and reform were basic to economic development.⁴ It was believed that vices impaired productivity and led to poverty. Sexual promiscuity threatened a Malthusian deluge which would diminish the per capita slice of the economic pie. Probably the flourishing state of the evangelical churches during the Second Great Awakening which occurred during this period provided an adequate form of regulating much personal moral behavior.

In discussing the slide into materialism which took place after the Revolution at the expense of religious, otherworldly values, Nelson neglects to note the extent to which the church had been preaching against materialism in Massachusetts for a century while discovering the new bounties of the post-war period to be a divine blessing which heralded the coming of the millennium. Development here, of course, included more than amassing fortunes; it involved new forms of transportation, advances in communication, applied technology, relief from drudgery and the advance of health care. While this may well be another case of the church's accommodating the status quo, in the eyes of many contemporaries there was spiritual progress in the destruction of monopoly, the creation of relief-giving bankruptcy acts, the rise of individualism and nearly any act which promoted economic development.

3. D. H. Flaherty, *Law and the Enforcement of Morals in Early America*, 5 PERSPECTIVES IN AM. HIST. 225-53 (1971).

4. C. Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 292-303 (1962).

5. M. J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEG. HIST. 275-94 (1973).

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Is it possible, then, that the churches and the lawyers were (and are) both implicated in creating that peculiar blend of nationalism, Protestantism and capitalism which characterized nineteenth century American society and is still a powerful current today? And does the legal profession function today as the servant of those interests whose principal goal is to forestall any redistribution of wealth?

Those are the kinds of questions that the new legal historians like Nelson are raising and that make legal history today interesting and relevant to contemporary developments. Traditional conservative legal history under the influence of Roscoe Pound thought of the law as scientific, as having its own internal development, and as distinct from politics and historical contingencies. The new historians place law in its social context, suggesting that to do so will help lawyers avoid that professional tunnel vision which separates their craft from its larger consequences and contributes to the divided psyches which debilitate many sensitive practitioners in all the professions today.

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